

## STATE OF VERMONT

## HUMAN SERVICES BOARD

In re ) Fair Hearing No. 12,412

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Appeal of )

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INTRODUCTION

The petitioner appeals the decision by the Department of Social and Rehabilitation Services (SRS) revoking her Family Day Care Registration Certificate. The issues are whether the petitioner violated regulations restricting the number of children in care and whether SRS abused its discretion in determining that the violations should result in the revocation of the registration.

FINDINGS OF FACT

1. The petitioner is a home day care provider and has been registered as such with SRS for more than five years. Home day care registrants are provided with information booklets which summarize the regulations including the number of children allowed in care at any given time. A copy of the page explaining the group size requirements is attached hereto as Exhibit One and incorporated by reference herein.
2. In late October of 1992, SRS received a report that the petitioner had been caring for more than two infants during the previous summer. Pursuant to these reports, an unannounced visit to her day care home was made on October 26, 1992, by a licensing inspector from SRS. During that visit, the inspector observed that the petitioner was the sole adult in the day care home and that she was caring for her own under two year old child and two other children under two as well as a few other preschoolers. The petitioner admits that this was the situation and that she told the investigator it occurred because she did not understand that her own child had to be included in the number of children counted.
3. At the conclusion of the visit, the investigator discussed the prohibition in the regulations against more than two children under two (including the caretaker's own children) and asked the petitioner to sign a form acknowledging the error and the discussion. The petitioner was required to post a notice of the violation for her clients.

4. On May 26, 1993, the investigator made an unannounced follow-up visit to the petitioner's home. The petitioner was not at home, but her twenty-one-year-old daughter was there caring for six children, two of whom were under the age of two. The investigator asked the petitioner's daughter some questions about children who were scheduled to arrive on a later shift and ascertained from that conversation, that if all the children came, the petitioner would be one child over the maximum limit. The investigator asked the petitioner's daughter if another caretaker would be on duty at that time but the daughter did not know. The daughter was asked to and did sign a form acknowledging their conversation. The investigator did not wait to speak to the petitioner who was away from home for about thirty minutes to pick up a sick child from school. 5. The petitioner was notified following that visit to bring her numbers into compliance by May 31, 1993. She was also asked to make some fairly extensive repairs which were felt to be necessary to protect the safety of the children. On May 28, 1993, the petitioner was asked to and did sign a stipulation in which she agreed to abide by the regulations.

6. On August 4, 1993, the investigator again made an unannounced visit to the petitioner's day care home. On that day, the petitioner, along with a second caretaker, was caring for eleven children, including three children under the age of two and eight preschoolers. The petitioner was informed by the investigator that she had violated the regulations because she was only allowed to have six preschoolers in the summer. The investigator did not have a problem with the three children under two because two caretakers were present. The petitioner stated that she had misunderstood the regulations and signed a form acknowledging that she was out of compliance with the regulations and had violated the stipulation. She was told to reduce her numbers by August 9, 1993.

7. At that same August visit, two children were observed playing near the front of the barn (which was not locked and contained farm machinery) without an adult with them, although the front of the barn was visible from the kitchen window. The barn was not visible from the table where the petitioner and the investigator sat talking. The petitioner stated that had she not been talking with the investigator, she would have been looking at the children out the window. She also said that the father of one of the children was in the barn. She agreed to secure the barn and keep the children within her sight.

8. On October 1, 1993, the petitioner was notified that her day care registration would be revoked as of October 31, 1993, for a number of reasons. At the time of the hearing, the Department only relied on and offered testimony with regard to the number of children in care and the lack of supervision of the two children by the barn as the basis for its revocation. The letter referred to the following incidents relevant to those claims:

- There were 3 children under the age of 2 present and one caregiver on October 26, 1992.
- There were 3 children under the age 2 present with only one caregiver, based on the enrollment forms and written schedule of when children are scheduled to be present on May 26, 1993.
- There were 11 children present (3 under 2 years of age, 5 other preschoolers and 3 school age children) on August 4, 1993.
- Two children were playing by the barn unsupervised. This is not easily visible from inside the home. There were items in this barn not safe or appropriate.

9. The petitioner appealed that proposed revocation on October 25, 1993, stating that areas of improvement had been pointed out to her which she met. On November 16, 1993, she met with the

program administrator to present her case.

10. On December 3, 1993, at the request of the Commissioner, the investigator again visited the petitioner's day care home. At that time she noted that all repairs had been made to the inside and outside of the house and that the door to the barn had been secured to make it inaccessible to children. She noted in her written report that "[petitioner] has been successful in clearing the outside yard and the interior of her home free from visible hazards to the children in care." The only violation she noted at that time was in the "caregiver/child ratio" because upon her arrival there were two children under two and five preschoolers in care with one caretaker, exclusive of the petitioner's own children. She noted that the fifth preschooler was picked up within five minutes of her arrival.

11. The petitioner explained that the fifth preschooler was scheduled to have left earlier but was unable to do so because his parent had car trouble. The fact that the child was picked up almost immediately following the investigator's arrival adds credence to her claim which is found to be fact.

12. On the same day as this visit, the Commissioner mailed the petitioner a letter dated December 3, 1993, stating that the Department had concluded that she had "repeatedly and deliberately been in violation of numbers regulations despite repeated warnings and an additional signed agreement to abide by the regulations on numbers of children in care". The Department found that the petitioner had "demonstrated a consistent pattern of deliberate unwillingness to abide by the legal limits on numbers of children in care and to take effective action to abate hazards to children that occur on your premises. These facts, combined with a demonstrated tendency to stretch the limits of appropriate supervision create an unacceptable hazardous setting for child care."

13. It is not possible to conclude, as the Department did, on the evidence presented at the hearing that the petitioner repeatedly or deliberately violated regulations on numbers of children in care. The only clear violation of the regulations on number of children in care occurred back in October of 1992, when the petitioner had three infants in care with one caretaker. After she was advised of her violation and warned to take corrective measures, that particular violation never occurred again. There is no reason to find that the original violation was not a good faith error.

14. The Department's conclusion that the petitioner violated the prohibition on numbers of children in care in May of 1993, was not based on an observation of an excess number of children in care. In fact, when the investigator arrived and throughout the entire duration of her thirty minute unannounced visit, only the permissible number of children were in care. The Department's finding that the petitioner was about to be in violation was based on incomplete information it got from a caretaker who did not run the day care home. The Department did not determine how many caretakers would be present and, in fact, never spoke with the petitioner at all before its conclusions were reached. Its conclusion that the petitioner actually violated the group size requirements in May of 1993, is without foundation.

15. Neither can it be concluded that the petitioner was deliberately in violation of the caretaker/child ratio in August of 1993. Two Departmental employees, the investigator and the day care chief, have themselves taken different positions about the actual violation found at that time. The investigator says that there were eight children of preschool age which caused the violation, not the presence of three children under two. The revocation letter from the chief states that the violation occurred because there were three children under two, and found that five children were preschoolers and three were school age. The handout, describing Group Size, (Exhibit One) presents four possible options for summertime care including an Option A which allows six children per caregiver so long as no more than two are under

two, itself suggests that perhaps two caregivers together could have twelve children with no more than four children under two. Because of the imprecision of the information given to the petitioner and the divergent interpretations given to the situation within the Department itself, it cannot be found that the petitioner was ever put on notice or should have understood what the accurate group size requirements were for the summertime. Although the investigator claims to have repeatedly advised the petitioner as to the requirements, her lack of any specific memory as to what was actually said, lack of documentary proof as to what other information might have been given to the petitioner, and her own apparent confusion as to what the regulations required, make it impossible to find that the petitioner was accurately advised as to the requirements before (or even after) August of 1993 and add credence to the petitioner's claims that she misunderstood the requirements.

16. The December 1993 visit, made after the decision to revoke had already been mailed, similarly did not reveal a deliberate violation. There was an extra child in the petitioner's child for a very short time. The evidence made it very clear that the petitioner had not planned to have that extra child and that he was there as the result of a parent's emergency inability to pick him up on time. The investigator admitted that the child (who was over two years old) left almost immediately after her arrival, and no other children replaced him. A violation, if it existed here, was certainly not intentional and was, because of its short duration, de minimis, posing little if any harm to the other children in care.

17. Finally, it cannot be concluded that the petitioner deliberately and repeatedly left children unsupervised. The evidence shows only that on one occasion two children were observed without an adult near a barn which was visible from the kitchen window. In response to this criticism, which primarily centered on the hazardous equipment in the barn, the petitioner secured the barn. Nothing further of the kind was ever noted.

18. The evidence indicates, contrary to the Department's finding, that the petitioner corrected all errors pointed out to her (including taking effective action to abate hazards to the children on the premises), that she never deliberately repeated the same error twice, and that any violations of the regulations which occurred were good faith mistakes or the result of a credible emergency.

### ORDER

The decision of the Department to revoke the petitioner's day care registration is reversed.

### REASONS

33 V.S.A. § 306 (b) (1) authorizes the Commissioner of Social and Rehabilitation Services to issue regulations and to prescribe standards governing the revocation of day care home registration certificates. When the Department determines that a health or safety rule has been violated, a notice of same must be posted in the facility and

[i]n the case of a serious violation, as defined by the department by rule, the facility or home shall also notify a person responsible for the welfare of each child attending that facility or home, by mail. A serious violation shall include violation of group size and staffing requirements and any violation involving a situation which immediately imperils the health, safety or well-being of persons in the care of the licensee or registrant.

33 V.S.A. § 306(b)(7)

The regulations further provide that "A license or registration may be revoked for cause after hearing and may be suspended in situations which immediately imperil the health, safety or well-being of persons in the care of the licensee or registrant." 33 V.S.A. § 306(b)(4.)

Pursuant to this regulatory authority, the Department has promulgated the following relevant regulations:

## Section II - Program -

1. A registrant may provide care in their home to six (6) children at any one time and, in addition to the six may care for up to four (4) school-age children for not more than four hours daily per child. (See Options Table on Next Page)

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Option A- Six children any age including up to two children under the age of two per caregiver.

...

## Summer Vacation - Option D - Twelve children in care

provided that at least six have been to kindergarten or graded school and a second caregiver is present and on duty when the number of children exceeds six. Preschoolers who reside in the residence of the Registrant are included in the twelve.

...

2. There shall be at least one caregiver present and providing child care at all times when children are in care.

a. preschoolers and school age children may be monitored from inside the home if their area of play is within sight and earshot of a caregiver.

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10. Children in care shall be protected from any and all conditions which threaten a child's health, safety and well-being.

## Regulations for Family Day Care Homes

Adopted September 1, 1989

The Department proposed to revoke the petitioner's registration because she repeatedly and deliberately violated regulations relating to group size, supervision, and physical safety of the children. If these allegations proved to be true, the Department would undoubtedly have good cause for revoking the petitioner's day care registration certificate. However, for all the reasons cited above, it cannot be found

that there was a deliberate and repeated violation of these regulations.

It may be that the petitioner actually violated these regulations at some time, but there is no evidence that any violation was deliberate or deliberately repeated. In October of 1992, the petitioner clearly violated the regulations on group size but claimed a good faith misunderstanding and promised to remedy the situation. The Department was obviously willing to give her another chance at that point. During the May 1993 visit, the number of children actually in the petitioner's day care during the unannounced visit was in compliance. In August, there is no doubt that the petitioner had purposefully scheduled more than six preschoolers but it cannot be found that she was or should have been aware from the "Option" sheet she received that her group size was not appropriate. At that point, the Department decided to revoke her registration for deliberate violations although there was little to indicate that she knew or should have known what the regulations were or that she had purposely ignored the requirements and imperiled her charges.

The investigator testified that she had explained the regulations to the petitioner and had her sign all kinds of documents so attesting. However, she introduced no evidence as to what she actually told the petitioner other than that her current situation was not correct ("one caretaker cannot care for more than two children under two" and "eight preschoolers are not allowed in the summer"). Unfortunately, the investigator's own testimony indicated that she was easily confused herself as to what the requirements were and that her assessments as to the reasons for group size violations were not the same as those of the licensing chief. (Neither were her fact findings.) It is entirely likely that the same lack of clarity about group size requirements which was exhibited at the hearing was likewise exhibited to the petitioner. In any event, it would be totally unfair, based on the Department's Exhibit One and its witness' testimony, to conclude that the petitioner was conversant with the intricacies of the summer group size requirements.

Neither did the Department prove that the petitioner deliberately and repeatedly failed to supervise children or remove hazards from the premises. The children playing outside were within sight of the house and all hazards inside and outside, including the barn access, were completely remedied by the date of the Commissioner's final decision, as the investigator candidly stated both orally and in writing. The investigator also confirmed that the petitioner was cooperating with hazard removal and had completely satisfied the Department by the time of her last inspection. The Department's determinations in this regard are completely contradicted by the evidence presented by its own witness and their continuation as grounds in this matter are entirely puzzling.

As the Department has failed to show that it had the good cause claimed in its revocation letter, its decision to revoke the petitioner's day care registration should be reversed. Some effort should be made at this point by someone who understands the regulations to insure that they are made clear to the petitioner and she should be sure to absolutely abide by them in the future, including making provisions for extra help should emergency situations arise.

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